OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 22 November 1990 *

Mr President,
Members of the Court,

1. The Tribunal de Grande Instance (Regional Court), Saint-Quentin, and the Cour d'Appel (Court of Appeal), Mons, have submitted to the Court a number of questions for a preliminary ruling on the compatibility with Community law of a rule of national law prohibiting the employment of workers on Sundays. In view of the similarity between the rules of national law referred to in the disputes in the main proceedings, and also having regard to the fact that the two references raise largely the same questions of Community law, I shall deal with both cases in a single Opinion.

Background

2. In the main proceedings in Case C-312/89, the Union Départementale des Syndicats CGT de l'Aisne seeks an injunction restraining Conforama, which sells furniture and household equipment, from opening its shops on Sundays, subject to a fine for contravention. The claim is based on a certain provisions of Chapter 1 of Title II of the French Code du Travail (Labour Code), according to which the weekly rest day for workers must in principle be granted to them on Sunday (see Article L.221-5 in conjunction with Articles L.221-2 and L.221-4). There are three kinds of exceptions to that fundamental rule. First, the prohibition is waived in a number of sectors exhaustively listed in the Code du Travail, for instance restaurants, hospitals, newspaper vendors and so on (see Article L.221-9 of the Code du Travail). Secondly, an exception may be made in the case of undertakings whose staff work in shifts; the application of that exception depends in principle on the conclusion of a collective labour agreement (see Articles L.221-5-1 and L.221-10 of the Code du Travail). Finally, temporary derogations may be granted on request by a local authority (see Articles L.221-6, L.221-7 and L.221-19 of the Code du Travail).

It does not appear to be disputed that the defendants in the main proceedings are not entitled to the application of any of those exceptions. However, they have opposed the plaintiff's claim on the ground that the prohibition on the employment of workers on Sundays introduced by the Code du Travail must be regarded as contrary to Articles 30 and 85 of the EEC Treaty. The national court, the Tribunal de Grande Instance, Saint-Quentin, has agreed to refer to the Court for a preliminary ruling a question which, however, is limited to the interpretation of Article 30 of the EEC Treaty. That question is worded as follows:

'Can the concept of "measures having equivalent effect" to quantitative restrictions on imports contained in Article 30 of the EEC

* Original language: Dutch

Treaty be applied to a general provision whose effect is to prohibit Sunday working for employees, *inter alia* in a sector such as furniture retailing, when

(1) that sector deals to a large extent in products imported, *inter alia*, from Member States of the EEC;

(2) a considerable proportion of the sales of undertakings in that sector is made on Sundays in cases where those undertakings have taken the step of contravening the provisions of national law;

(3) closure on Sundays has the effect of reducing the volume of sales effected and thus the volume of imports from Member States of the Community; and, finally,

(4) the obligation to allow employees their weekly rest period on Sundays does not apply in all the Member States?

If so, can the characteristics of the sector in question be regarded as meeting the criteria set out in Article 36 of the EEC Treaty?'

3. The first defendant in the second case, C-332/89, is managing director of Trafitex SA, a company which runs a department store managed by the second defendant. They were prosecuted before the Tribunal Correctionnel (Criminal Court), Charleroi, which sentenced them on 1 July 1988 to payment of a fine with terms of imprisonment in the alternative for committing an offence contrary to the Belgian Loi sur le Travail (Labour Law) of 16 March 1971; the appeal lodged against that judgment is pending before the national court, the Cour d'Appel, Mons.

Article 11 of the Loi sur le Travail prohibits the employment of workers on Sundays. Once again, there are several exceptions. Article 3(1) of that law excludes certain categories of workers (including persons employed by the State, persons working in a family business and fishermen) from the scope of the prohibition. Further exceptions are set out in Article 12 *et seq.* of the law and apply, amongst other things, to the supervision, cleaning and maintenance of business premises, to shift work and so on. Article 13 of the law provides that a list may be drawn up by royal decree of undertakings in which, and of tasks for which, workers may be employed on Sundays. Retail shops whose staff may not, on the basis of that list, work on Sundays are authorized by Article 14(1) of the law to employ their workers on Sundays from 8 a.m. to twelve noon.

More specifically, the defendants in the main proceedings are charged with employing workers on Sunday after twelve noon, contrary to the last-mentioned provision. In the proceedings before the Cour d'Appel, the defendants maintain that the prohibition in question is incompatible with both the provisions of the EEC Treaty on the free movement of goods and services and Article 85 of the Treaty. Taking the view that the defendants' arguments do not

at first sight appear to be entirely devoid of substance, the national court has submitted the following question to the Court of Justice for a preliminary ruling.

'Are Articles 1, 11, 14(1), 53, 54, 57, 58 and 59 of the Law of 16 March 1971, as amended in particular by the Law of 20 July 1978 and by Royal Decree No 15 of 23 October 1978, contrary to Articles 3(f), 5, 30 to 36, 59 to 66 and 85 of the Treaty of Rome of 25 March 1957?'

That question must be understood as seeking from the Court a ruling on the interpretation of the aforesaid Treaty provisions so as to enable the national court to assess the compatibility with Community law of the aforesaid provisions of national law. [1]

The interpretation of Article 30 of the Treaty

4. The answer to be given to the questions for a preliminary ruling now before the Court concerning Article 30 of the Treaty must be influenced to a large extent by the judgment of the Sixth Chamber of the Court of 23 November 1989 in Case C-145/88, *Torfaen Borough Council* v *B & Q PLC*. [2] The Cwmbran Magistrates' Court, United Kingdom, had asked the Court for a ruling on the question whether a national rule which in principle prohibited the sale of goods on Sundays was to be regarded as contrary to Article 30 of the EEC Treaty. The Court ruled as follows:

'Article 30 of the Treaty must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind.'

5. Before considering that judgment in greater detail, I should like to draw attention to the similarity between the national legislation which forms the subject-matter of the reference in Case C-145/88 and that which forms the subject-matter of the reference in the cases now before the Court.

Whereas Case C-145/88 was concerned with a general prohibition on Sunday trading, these cases are concerned with a prohibition on employing workers on Sundays. In my view that distinction is not of great importance: as regards the application of Article 30 of the Treaty the effects on intra-Community trade resulting from the two types of legislation are very similar. In Case C-145/88 the national court found that the ban on Sunday trading had led to a reduction in the total sales of the undertaking concerned, that approximately 10% of the goods sold by that undertaking came from other Member States and that a corresponding reduction of imports from other Member States would therefore ensue. In the present cases, the national courts would seem to be confronted with a similar pattern of facts. In the question submitted to the Court in Case C-312/89, mention is expressly made of three findings of fact by

1 — See the judgment of 20 April 1988 in Case 204/87 *Bekaert* [1988] ECR 2029, at paragraph 5, and the judgment of 7 March 1990 in Case C-69/88 *Krantz* v *Ontvanger der Directe Belastingen* [1990] ECR I-583, at paragraphs 7 and 8

2 — [1989] ECR 3851

the national court: the defendants operate in a sector that deals to a large extent in products imported from other Member States of the EEC, a considerable proportion of the sales of undertakings in that sector is made on Sundays, and closure on Sundays has the effect of reducing the volume of sales effected and thus the volume of imports from other Member States.

The order for reference in Case C-332/89 does not contain any comparable findings, but it appears from the documents before the Court that an expert's report was commissioned by the Tribunal Correctionnel, Charleroi, which shows that between September 1986 and December 1987 approximately 22% of the undertaking's turnover was made on Sundays and that if Sunday rather than Tuesday were designated as the weekly closing day a loss of turnover amounting to approximately 13% would ensue.[3] I also assume that, according to the finding made by the national court, the loss of turnover also related to products imported from other Member States. Otherwise this would be a situation which, in the absence of any cross-frontier factor, would fall entirely within the internal sphere of a Member State, to which Article 30 is inapplicable.[4]

As will become apparent, moreover, there is a strong similarity as regards the grounds which may be relied upon to justify them between the legislation which was the subject-matter of the judgment in Case C-145/88 and that at issue in the present cases. The relevance of the judgment given in the former case is, for that reason, all the greater.

6. In the *B & Q* judgment, the Court pointed out that the contested legislation was applicable to imported and domestic products alike (paragraph 11). It should be noted that the legislation concerned was applicable without distinction not only formally but substantively as well: it was apparent from the order for reference that the production or marketing of imported goods was not rendered more difficult than that of domestic goods. Referring to the judgment in *Cinéthèque*,[5] the Court stated that the compatibility with Community law of such legislation, neutral with regard to imported and domestic goods, depended on a twofold examination, namely whether the legislation pursues an objective which is justified with regard to Community law and whether the obstacle to Community trade created by such legislation exceeds what is necessary for the attainment of the objective in view (see paragraph 12 of the judgment).[6] The Court thereby acknowledged implicitly but unequivocally that the measure concerned was at first sight covered by the expression used in the *Dassonville* judgment, that is to say it was to be regarded as a 'trading rule . . . capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.[7]

3 — See Annex 2 to the observations of the defendants in the main proceedings.

4 — That principle was laid down by the Court in general terms (albeit in connection with freedom of establishment) in its judgment of 8 December 1987 in Case 20/87 *Ministère Public* v *Gauchard* [1987] ECR 4879, at paragraphs 11 and 12; see also, for a recent application of that principle in connection with the freedom to provide services, the judgment of 3 October 1990 in Joined Cases C-54/88, C-91/88 and C-14/89 *Nino* [1990] ECR 3537, at paragraphs 10 and 11.

5 — Judgment of 11 July 1985 in Joined Cases 60 and 61/84 *Cinéthèque* v *Fédération Nationale des Cinémas Français* [1985] ECR 2605, in particular at paragraph 22.

6 — This wording is more precise, in my view, than that referred to in the operative part of the judgment, quoted in paragraph 4 above, in which there is no reference to 'what is necessary' but only to the 'effects' intrinsic to rules of that kind. The criterion of 'necessity' has a normative content which the 'effects' criterion lacks.

7 — Judgment of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, at paragraph 5.

I should like to raise two points in that regard. In my Opinion in Case C-145/88 I proposed that the scope of the expression used in *Dassonville* should be slightly curtailed and that with regard to commercial legislation applicable to imported and domestic products alike the criterion of partitioning of the market which is used in competition cases should be applied. [8] In its judgment the Court did not take up that suggestion, implicitly preferring the *Dassonville* criterion in its broad terms, which it took as a point of departure. Should the Court wish to take a different approach in this case, I would refer it to my Opinion in the *B & Q* case. I am now proceeding on the assumption that the Court has opted in favour of the *Dassonville* rule once and for all and I therefore take that rule as my point of departure in this Opinion. This does not mean that the partitioning of the market which may result from national legislation is not something which can and indeed must be taken into account when it is necessary, in determining whether a given obstacle exceeds what is necessary, to compare the effect and purpose of the legislation examined (see paragraph 12 below).

A further point relates to the consequences of the *Dassonville* criterion for the national court. Although it is in principle for the national court to determine whether the national legislation in question is in fact capable of hindering intra-Community trade directly or indirectly, actually or potentially, the *Dassonville* rule, to which the Court adhered in *B & Q*, is so broad as to cover any legislation which contains a cross-frontier element as regards its purpose or effect. It is apparent from the case-law of the Court that even legislation which can create an obstacle to imports in the case of a single trader [9] is in principle caught by the *Dassonville* criterion, [10] or at least that the existence of such a possibility is considered sufficient to prompt the Court to examine whether there is any justification under Articles 30 or 36. [11] It is only when it does not impede the marketing of the product concerned at the level relevant for the purposes of intra-Community trade, [12] leaves other methods of marketing the same product intact, [13] or allows the product to be marketed without impediment through alternative circuits [14] that legislation does not fall within Article 30. [15]

7. Since in the *B & Q* judgment the Court acknowledged that the prohibition in Article 30 was applicable in principle to a rule prohibiting retailers from opening their premises on Sunday, it follows, in the light of the similarity established earlier (see paragraph 5 above), that the same conclusion must be drawn with regard to the prohibitions on Sunday working in the cases now before the Court, at least where in each of those cases the national court has established that the legislation was poten-

8 — Opinion delivered at the sitting on 29 June 1989, at paragraphs 13 to 15.

9 — That would not be the case here if it became apparent that in the case of the product concerned the trader made good on other days of the week the loss of turnover resulting from the prohibition on Sunday working.

10 — See the judgment of 16 May 1989 in Case 382/87 *Buet* v *Ministère Public* [1989] ECR 1235, at paragraphs 7 to 9, as well as the *B & Q* judgment.

11 — That is clearly the case in *B & Q*, where the existence of a justification is sought in the light of the *possible* effects on Community trade which *may result* from the national rules under examination; see the operative part of the judgment.

12 — Judgment of 14 July 1981 in Case 155/80 *Oebel* [1981] ECR 1993, at paragraphs 19 and 20. See also the judgment of 25 November 1986 in Case 148/85 *Direction Générale des Impôts* v *Forest* [1986] ECR 3449, at paragraph 19.

13 — Judgment of 31 March 1982 in Case 75/81 *Blesgen* v *Belgium* [1982] ECR 1211, at paragraph 9.

14 — See the judgment of 11 July 1990 in Case C-23/89 *Quietlynn* v *Southend Borough Council* [1990] ECR 3059, at paragraph 11.

15 — It is clear from the last two situations that the Court accepts that one trader's loss of turnover can be made up for by additional sales made by other traders in the same Member State. In that regard the Court relies on simple possibilities resulting from *the scope* of the legislation examined (see, for instance, paragraph 19 of the judgment in *Oebel*, cited in footnote 12), without requiring statistical evidence, which in practice cannot easily be furnished.

tially capable of restricting imports within the meaning of the *Dassonville* criterion.

Nevertheless, I cannot leave it at that, since I would thereby ignore an important matter to which the Commission has drawn attention in its observations. In the *B & Q* judgment the Court states that the question whether the effects of specific national rules in fact actually remain within the framework (as required by the judgment: see paragraph 6 above) of commercial legislation which *ex hypothesi* is justified is a question of fact to be determined by the national court (paragraph 16).

The Commission argues that the assessment of the need for and proportionality of specific legislation cannot be left to the national courts, and the arguments which it advances in support of that view are in my opinion persuasive. Admittedly, it is not for the Court to rule in proceedings under Article 177 of the Treaty on the validity of national legislation; nevertheless the Court has always emphasized that, in the interest of the cooperation with the national judicial authorities which that provision envisages, it is empowered to set out the elements of Community law which will enable the national court to give judgment on the dispute before it in accordance with the rules of Community law. [16] Only in that way is it possible to safeguard the main purpose of the preliminary ruling procedure, namely to ensure the uniform application in the Community of the provisions of Community law in order to prevent their effects from varying according to the interpretation given to them in the different Member States. [17]

More specifically, in connection with the national court's examination of the permissibility of national legislation, this implies that sufficiently clear criteria are made available to that court to enable it to ascertain whether national legislation is in conformity with Community law. [18] In its case-law on the free movement of goods the Court has steadfastly adhered to that principle, [19] and I would firmly recommend that it continue to do so.

In the present cases, the need for precise criteria is admittedly not so great since, following the judgment in *B & Q*, the issue can easily be resolved. Nevertheless, even in clear-cut cases it is still necessary to set the solution in a general context. Otherwise there is a risk of creating an obscure line of cases of little assistance to the national courts.

8. In my search for general criteria, I shall, in accordance with the reasoning followed by the Court in *B & Q*, first consider when it can be said that national legislation which,

16 — See, for instance, the judgments of 13 March 1984 in Case 16/83 *Prantl* [1984] ECR 1299, and of 14 October 1980 in Case 812/79 *Attorney General* v *Burgoa* [1980] ECR 2787, especially at paragraph 13.

17 — See, for instance, the judgment of 20 September 1990 in Case C-192/89 *Sevince* v *Staatssecretaris van Justitie* [1990] ECR 3461, at paragraph 11.

18 — In that respect the *B & Q* judgment leaves more than one question unanswered, as is illustrated by the reference in Case C-304/90 which has just been lodged at the Registry, in which the Reading and Sonning Magistrates' Court asks a series of detailed questions on the interpretation of that judgment and, in particular, the application of the criterion of proportionality (see the second question submitted for a preliminary ruling in that case).

19 — See, for instance, the judgment of 11 July 1985 in *Cinéthèque*, already referred to in footnote 5, at paragraphs 22 and 23, and the judgment of 14 July 1988 in Case 407/85 *3 Glocken* v *USL Centro-Sud* [1988] ECR 4233, at paragraphs 12 to 27. See also the judgment of 7 March 1990 in Case C-362/88 *GB-InnO-BM* v *Confédération du Commerce Luxembourgeois* [1990] ECR I-667.

like that now before the Court, is entirely neutral with regard to imported products and domestic products, pursues an objective which is justified by Community law, and then consider in further detail the question whether any obstacles to trade which may be caused by the legislation exceed what is necessary in order to achieve the objective pursued.

That presupposes a threefold examination, namely to ascertain whether or not the purpose of the legislation is justified (paragraphs 9 to 11 below), to ascertain the nature of the obstacles created by the legislation (paragraph 12), and finally to ascertain the need for those obstacles (paragraphs 13 and 14).

9. Let us begin with the question whether the legislation under consideration pursues an objective justified by Community law. In the observations submitted to the Court no attempt whatsoever is made to justify the legislation by reference to any one of the grounds listed in Article 36. Nor does the Court do so in the *B & Q* judgment. Rightly so, in my view, since the sole ground which can reasonably be taken into account is the protection of public health. Admittedly, the prohibition on the employment of workers on Sundays safeguards a day of rest for workers, and consequently promotes the 'health . . . of humans', but it is nevertheless directed at another objective, as specified below, in precisely the same way as a prohibition on Sunday trading imposed on self-employed traders. [20]

The position is different as regards the 'mandatory requirements' recognized by the Court in the *Cassis de Dijon* judgment. [21]

The protection of the working environment (expressly referred to in Article 100a of the EEC Treaty) and the related interest of workers' welfare can undoubtedly be regarded as a mandatory requirement. However, neither of those requirements is sufficient in itself because, as the defendants in Case C-312/89 state, they do not provide a sufficient justification of the duty imposed on employers to grant the weekly rest day on one and the same day, namely on Sunday. A rule which prohibits the employment of workers on Sundays can be justified only if it is compatible with Community law for a Member State to opt for a prohibition on Sunday working or Sunday trading in order to enable its citizens as far as possible to enjoy the same day of rest, thereby enabling them freely to pursue all kinds of non-occupational (such as family, religious, cultural and sports) activities together. This means, however, that a fresh justification is added to the list of mandatory requirements.

10. In that respect the *B & Q* judgment illustrates a remarkable trend. It refers first to the 1981 judgment in *Oebel*, [22] in which the Court stated — albeit not directly in connection with the assessment of a possible justification — that a German prohibition on working in the bakery industry before 4.00 a.m.

'. . . in itself constitutes a legitimate element of economic and social policy, consistent with the objectives of public interest pursued by the Treaty. Indeed, this prohibition is designed to improve working conditions in a manifestly sensitive industry, in which the

20 — If its purpose is the protection of the health of humans, there is no justification for requiring the compulsory day of rest to be taken on the same day: see below.

21 — Introduced by the judgment of 20 February 1979 in Case 120/78 *Rewe Zentrale* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, at paragraph 8.

22 — Judgment of 14 July 1981, *supra*, footnote 12

production process exhibits particular characteristics resulting from both the nature of the product and the habits of consumers' (paragraph 12).

Proceeding on that basis in the *B & Q* judgment, this time in connection with the assessment of a justification, the Court stated that:

'The same consideration must apply as regards national rules governing the opening hours of retail premises. Such rules reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of Community law, is a matter for the Member States . . .' (paragraph 14).[23]

In that and other judgments,[24] it is possible to detect a readiness on the part of the Court to recognize, alongside the 'classic' justifying grounds based on the *Cassis de Dijon* doctrine (such as the protection of consumers, fair trading and, in conjunction with those two grounds, the pursuit of market transparency, the effectiveness of fiscal supervision, and the protection of the environment and the working environment), some of which have now been incorporated in Article 100a of the Treaty, further 'mandatory requirements' and to classify them, with or without the existing ones, under a single rubric. This might, for instance, be described as: all national legislation whose enactment entails political, cultural or socio-economic policy choices which are in keeping with the objectives in the general interest pursued by the Treaty (such as those referred to in Article 100a) or is appropriate to specific national or regional socio-cultural or other features which, in the present state of Community law, are to be assessed by the Member States.

The crux of the matter — if the broad rule laid down by the Court in *Dassonville* is taken as a point of departure — is the need to classify the numerous potential justifications as far as possible under a general but exhaustive rubric. It is clear from the attempt made in the preceding paragraph that such a rubric cannot, in view of the vague concepts which it expresses, provide a firm line of action. Nevertheless, it can, to some extent, serve as a rough guide. It is clear, for instance, that the designation of Sunday as a general day of rest falls under that rubric, as the Court indeed indicated in the *B & Q* judgment: the imposition of at least one weekly rest day is undoubtedly a policy choice directed at the protection of the working environment and of the health of humans, which are objectives recognized by the Treaty. The designation of Sunday as the day of rest is a choice suited to the specific socio-cultural characteristics of the Member State in question.

11. The difficulty of establishing an entirely conclusive general guideline with regard to justifying grounds makes it all the more important to maintain a proper division of tasks between the national courts and the Court of Justice. To be sure, it is first and foremost for the national court to assess the conformity with Community law of specific

23 — See also the remainder of this passage, in paragraph 12 below.

24 — See, *inter alia*, the judgment of 11 July 1985 in *Cinéthèque*, cited in footnote 5 above.

national legislation and to ascertain whether it falls within one of the grounds of justification, but in so doing it must take into account the case-law of the Court. This means, in my view, that where a justification relied upon before the national court in relation to national legislation is not linked to one of the grounds already expressly referred to by the Court, the national court ought to submit a question to the former for a preliminary ruling. It is then for the Court to determine whether a new justification which has been relied upon is acceptable.

If the answer is in the affirmative, it is then a matter for the national court to ascertain whether the national legislation, as interpreted and applied, actually pursues the intended objective which the Court has acknowledged is in keeping with the Treaty, or whether it is used for another purpose. Hence it is also for the national court to assess whether any action is to be taken on complaints such as those of the defendants in the main proceedings concerning the inconsistency and the sporadic or uneven application of the legislation under consideration. If such application leaves intact the justification for the legislation according to Community law, it is not for the Court to rule on that legislation.

12. If the national legislation in question falls within a ground of justification, the next step is to examine the nature and extent of the obstacles created by it. It may be seen from the Court's case-law that in that respect too the Court lays down guidelines in response to questions of interpretation which national courts must take into account.

In that regard, it is important first of all to determine that the national legislation in question is applicable without distinction to imported and domestic products and that it does not render the marketing of imported products more difficult than that of domestic products. If the national legislation is not discriminatory either in formal or substantive terms, the next step is to ascertain whether it is 'designed to govern the patterns of trade between Member States'.[25] That cannot be said of legislation which imposes a restriction on opening hours for shops or on the employment of workers on Sundays — that is to say, concerns rules which govern the exercise of a commercial activity and are not aimed at a specific product. Nevertheless, it is still necessary to ascertain whether the legislation may have an 'unintended' effect on intra-Community trade in the broad sense of the term as used by the Court in *Dassonville*. That would undoubtedly be the case if the legislation were to hinder in one way or another interpenetration between the domestic markets within the Common Market — for instance, if it had the effect of raising barriers within a Member State so as to render access to the domestic market more difficult (more expensive) or less attractive (unprofitable) to producers of, or dealers, in goods from other Member States.[26] Once again, that cannot normally

25 — See the *B & Q* judgment, cited above, at paragraph 14, final sentence. That expression can also be found in other judgments: see, for instance, the *Quietlynn* judgment, cited in footnote 14, at paragraph 11, the *Krantz* judgment, cited in footnote 1, at paragraph 11, and the *Cinethèque* judgment, cited in footnote 5, at paragraph 21 (in which it was stated that this was the case with regard to any system applicable without distinction to domestic and imported products).

26 — For more details on that point, see my Opinion in Case C-145/88, referred to in footnote 8, at paragraphs 17 to 25.

be said of legislation which prohibits Sunday trading or Sunday working.

13 .The extent to which it can be concluded that legislation, in the terms of the *B & Q* judgment (paragraph 12), does 'not exceed what [is] necessary in order to ensure the attainment of the objective in view' (which is *ex hypothesi* justified with regard to Community law), will depend on the extent to which the examination of the effects of the legislation reveals the existence of a serious obstacle to intra-Community trade. Thus legislation which clearly has the effect of partitioning the market, even if it is not designed to govern patterns of trade between Member States, clearly goes far beyond what is strictly necessary in order to achieve the objective pursued.[27] However, legislation of the kind at issue in these cases, which is not designed to govern patterns of trade between Member States or to partition the market, can easily be regarded as remaining within the limits of what is necessary.

14. That brings us to the classic requirements of necessity and proportionality applied by the Court. Although those two requirements are frequently examined at the same time in the judgments of the Court, as part of an analysis which adheres closely to the specific legal and factual situation,[28] the two concepts are not co-extensive.[29] The requirement of necessity has two aspects: first of all that the national legislation in question is in fact relevant for the attainment of the objective pursued — in other words, that there is at least potentially a causal connection between the two; secondly, that there is no alternative to such legislation which is equally effective but less restrictive of intra-Community trade (the criterion of the least restrictive alternative). The criterion of proportionality, on the other hand, is to be understood as meaning that even if legislation is relevant and is the least restrictive of trade, it is nevertheless incompatible with Article 30 (and must therefore be repealed or replaced by a less effective measure) where the obstacle which it creates to intra-Community trade is out of proportion to the objective pursued.

In my view, the criterion applied by the Court in the *B & Q* judgment, according to which an obstacle to intra-Community trade may not exceed what is necessary for the attainment of the objective pursued, reflects both aspects of the criterion of necessity: the restrictive national legislation is relevant with regard to the objective pursued, since it is necessary for the attainment of that objective and has therefore been enacted with that end in view; the legislation may not go beyond what is necessary for the attainment of that objective, which implies that a less restrictive alternative is not available. However, the criterion of proportionality is not incorporated in that, since on the basis of that criterion legislation which is necessary for

27 — It might well be regarded as a 'disguised restriction on trade between Member States' within the meaning of the last sentence of Article 36 of the Treaty, in which case none of the justifications under Article 30 or Article 36 can be relied upon. See the judgment of 3 December 1981 in Case 1/81 *Pfizer* v *Eurim-Pharm* [1981] ECR 2913, in which the Court considered that Article 36 prohibited the use of a trade mark so as to create an artificial partitioning of the markets within the Community (see also the Opinion of Mr Advocate General Capotorti in that case, in particular at p. 2935).

28 — See, for instance, the judgment of 20 May 1976 in Case 104/75 *De Peijper* [1976] ECR 613, at paragraphs 21 and 22, and the judgment of 8 February 1983 in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, at paragraph 16. See also the judgment in *Buet*, cited in footnote 10, at paragraphs 11, 12 and 15.

29 — See also my Opinion in Case C-169/89 *Gourmetterie van den Burg* [1990] ECR 2143, at paragraph 8 *et seq.*

the attainment of the objective in question, and therefore does not exceed what is necessary, must nevertheless be set aside by the Member State.

Does this mean that in the *B & Q* judgment the Court abandoned the criterion of proportionately and thus went back on its earlier case-law? I think not: in Case C-145/88 the Court had no need to rely on the criterion of proportionality — any more than it does in these cases — since it was immediately apparent, as it is now in these proceedings, that the obstacles created by the national legislation in question certainly were not, and are not, of such a kind as to compel the Member State to dispense with a measure necessary for the attainment of a justified objective. If, on the other hand, the obstacle is of such a kind as to jeopardize the integration of the market, it may seriously be doubted whether it is still proportionate to the in itself legitimate objective pursued by the measure. Hence I take the view that the absence of any reference to the criterion of proportionality in the *B & Q* judgment is not of fundamental importance and that the reason for the omission lay in the specific circumstances of the case, from which it was clear that any obstacles which might be created were not particularly serious.

For the sake of completeness, I should point out that it is the Court itself which weighs the objective and the obstacle, on the basis of both the criterion of necessity and the criterion of proportionality, in interpreting Article 30 or Article 36 in relation to specific national legislation described in a reference for a preliminary ruling.[30] In case of doubt, therefore, a national court can submit a question to the Court for a preliminary ruling.

15. Applying the foregoing considerations in relation to the interpretation of Article 30 of the Treaty to the national legislation before the Court, I come to the conclusion (a) that legislation imposing a (limited) prohibition on Sunday working of the kind at issue here may, according to the findings made by the national court, affect trade between Member States in the broad sense of the term as used in the *Dassonville* judgment; (b) that the objective pursued by that legislation, namely the designation of a single day of rest for employees, Sunday, may be regarded as a legitimate objective under Community law; (c) that the legislation at issue, which is neutral in relation to imports, is not designed to govern patterns of trade between Member States, and, again in the light of the findings made by the national courts, the obstacles to intra-Community trade resulting therefrom are not of such a kind as to jeopardize the integration of the market; (d) that in those circumstances it cannot be concluded that the obstacles created exceed what is necessary for the attainment of the objective pursued, or that they are out of proportion thereto.

Accordingly, I consider that the national legislation in question is compatible with Article 30.

30 — See the case-law cited in footnote 19

The interpretation of Article 34 of the Treaty

16. In the order for reference in Case 332/89 the Court has also been requested to give a ruling on the interpretation of Article 34 in connection with a prohibition on the employment of workers on Sundays. The question is thus whether such a prohibition can be regarded as a quantitative restriction on exports which is incompatible with the Treaty.

In order to answer that question it is sufficient to refer to the established case-law of the Court concerning Article 34 of the Treaty. In its judgment in Case 15/79 *Groenveld* v *Produktschap voor Vee en Vlees*, the Court stated as follows:

'That provision [Article 34] concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States. This is not so in the case of a prohibition like that in question [forbidding a manufacturer of processed meat products from having in stock or processing horsemeat] which is applied objectively to the production of goods of a certain kind without drawing a distinction depending on whether such goods are intended for the national market or for export' (paragraph 7).

That ruling, which has been followed by the Court in later judgments,[31] precludes commercial legislation applicable to products without distinction (in other words legislation which does not have as its specific object or effect the restriction of exports) from being considered incompatible with Article 34. That must also hold true for legislation of the kind now before the Court, which is applicable to products without distinction. As we have seen, it is not designed to govern patterns of trade between Member States, and there is no evidence that it renders the production or marketing of goods intended for export more difficult than that of goods intended for the domestic market.

The interpretation of Article 59 et seq. of the Treaty

17. Article 59 *et seq.* of the Treaty concern the freedom to provide services, and in its order for reference in Case C-332/89 the national court asks whether those provisions preclude a prohibition on the employment of workers on Sundays.

The answer to that question must, in my view, be deduced from the first paragraph of Article 60 of the Treaty, which provides as follows:

'Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, *in so far as they are not*

31 — See, for instance, in addition to the *Oebel* judgment (cited above in footnote 12), the judgment of 15 December 1982 in Case 286/81 *Oosthoek* [1982] ECR 4575, the judgment of 10 March 1983 in Case 172/82 *Fabricants Raffineurs d'Huile de Graissage* v *Inter-Huiles* [1983] ECR 555, and the judgment of 7 February 1984 in Case 237/82 *Jongeneel Kaas* v *Netherlands* [1984] ECR 483.

governed by the provisions relating to freedom of movement for goods, capital and persons (emphasis added).

Since in this case it must be assumed, on the basis of the judgment in Case C-145/88, that the legislation in question is commercial legislation falling within the scope of Article 30, the provisions on the freedom to provide services are not applicable to it.

The interpretation of Articles 3(f), 5 and 85 of the Treaty

18. Finally, it remains for me to consider whether the competition rules in the Treaty can be applied to legislation of the kind at issue. The defendants in the main proceedings have raised this question in both cases. Only the national court in Case C-332/89 has submitted that question to the Court, apparently on the basis of the defendants' argument that the legislation complained of 'distorts competition' and that by enacting or maintaining it a Member State is in breach of the rules of competition in the Treaty. However, Articles 3(f) and 85 do not deal with a disruption of competition of that kind: those provisions are indeed concerned with the maintenance of competition within the Common Market, but they impose a prohibition on agreements, decisions or concerted practices between *undertakings* which distort competition. There would not appear to be any question of agreements, decisions or concerted practices in the situation before the national court.

The Court has admittedly held that it follows from the combined provisions of Articles 3(f), 5 and 85 of the EEC Treaty that the principles laid down in Article 85 must also be complied with by the Member States. More specifically, the Court has held that the Member States are under a duty not to adopt or maintain in force any measures which could deprive Article 85 of its effectiveness. That would be the case, in particular, if a Member State encouraged the conclusion of agreements, decisions or concerted practices contrary to Article 85 or reinforced their effects.[32] However, there is no evidence whatsoever in the documents before the Court that this is so with regard to the legislation at issue.

Conclusion

19. On the basis of the foregoing considerations, I suggest that the Court answer the questions referred to it for a preliminary ruling as follows:

32 — See, for instance, the judgment of 1 October 1987 in Case 311/85 *Vereniging van Vlaamse Reisbureaus* v *Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, in particular at paragraphs 9 and 10.

'In Case C-312/89

Articles 30 and 36 of the EEC Treaty must be interpreted as meaning that the prohibition laid down therein does not preclude national legislation which forbids the employment of workers on Sundays where that legislation, which is not designed to govern patterns of trade between Member States, does not render the marketing of imported goods more difficult than that of domestic goods or render the market less accessible to imported goods. In such a case, any restrictive effects on intra-Community trade resulting from that legislation do not exceed what is necessary for the attainment of the objective pursued by it and are not out of proportion to that objective.

In Case C-332/89

Articles 30 and 36 of the EEC Treaty must be interpreted as meaning that the prohibition laid down therein does not preclude national legislation which forbids the employment of workers on Sundays where that legislation, which is not designed to govern patterns of trade between Member States, does not render the marketing of imported goods more difficult than that of domestic goods or render the market less accessible to imported goods. In such a case, any restrictive effects on intra-Community trade resulting from that legislation do not exceed what is necessary for the attainment of the objective pursued by it and are not out of proportion to that objective. Neither Articles 59 to 66 nor Article 3(f) in conjunction with Articles 5 and 85 of the Treaty are applicable to legislation of that kind.'